

SYKT PEMBINAAN JAKSA BERSATU SDN. BHD.

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v.

RAKYAT DEVELOPMENT SDN. BHD. & ANOR

HIGH COURT MALAYA, KUALA LUMPUR

SITI NORMA YAAKOB J

[CIVIL SUIT NO. F 441\85]

b

29 DECEMBER 1986

CONTRACT: Agreement for construction of shophouses between plaintiff and 1st defendant - 2nd defendant not party to agreement - Undertaking by 2nd defendant to carry on the construction - Allegation of total failure of consideration - Alleged breach of contract - Effect.

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CIVIL PROCEDURE: Order 14 application - Application dismissed - Appeal - Appeal dismissed- Application for further arguments in open Court - Final judgment entered appeal by 2nd defendant against this order - Whether any merit in 2nd defendant's contentions.

The plaintiff is a building contractor, the 1st defendant a housing developer and the 2nd defendant, one Latif bin Hj. Abu Bakar, the registered proprietor of a certain piece of land in the mukim of Chengkau, Rembau, Negeri Sembilan.

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On 29 September 1984 the 2nd defendant entered into an agreement with the 1st defendant whereby the 1st defendant agreed to develop the said land by the construction of 6 units of double-storey and 3 units of single storey shophouses. On 6 December 1984 the 1st defendant in turn entered into a building contract with the plaintiff whereby the plaintiff agreed to complete construction of the project not later than 6 May 1985 for a consideration of RM532,438. Under Clause 30 of this building contract all interim progress payments were to be honoured by the defendant within 2 weeks of the receipt of such claims.

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Claims totalling RM401,021.40 on the first and second progress payments were sent to the 1st defendant on 26 January 1985 and 1 March 1985 but instead of receiving payments from the 1st defendant, the plaintiff received a letter dated 6 March 1985 from the 2nd defendant informing it that he had already entered into an arrangement with the 1st defendant whereby he agreed to take full responsibility in completing the project. However the 2nd defendant failed to settle the claims on the 2 progress payments resulting in the plaintiff bringing this present action to recover the total sum due on the 2 progress payments with interest from both the defendants.

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Held:

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[1] Since the 2nd defendant had willingly taken over control of the whole project from the 1st defendant and had willingly executed the second agreement to meet payment of all sums due to the plaintiff, there is therefore no merit to the 2nd defendant's contention that he cannot be held liable to meet payment for claims issued pursuant to an agreement to which he was not a party.

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[2] As to the 2nd defendant's allegation of total failure of consideration in the secondary agreement, there is also no merit to this contention as forbearance to pay until after the 2nd defendant had obtained a loan is sufficient consideration for this contract.

[3] As to the allegation that the plaintiff had breached the secondary agreement by failing to assist him in obtaining the loan, which the 2nd defendant maintains is a condition precedent to the agreement, there is no such condition prescribed in the agreement.

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- a** [4] In the circumstances, it is only just and proper that the 2nd defendant should be held responsible for the payment of the sums claimed for work done on a project that will be of great financial benefit to him.

[Judgment for plaintiff.]

Legislation referred to:

- b** Rules of the High Court 1980, O. 14

For the plaintiff/appellant - Yusoff Shamsuddin; M/s. Yusoff Shamsuddin & Partners

For the 2nd defendant/respondent - Heng Aik Luan; M/s. Nordin Torji & Yussof Ahmad

JUDGMENT

- c** **Siti Norma Yaakob J:**

The plaintiff in this suit is a building contractor, the first defendant a housing developer and the second defendant the registered proprietor of land held under H.S. (M) 139 Lots 161 to 169 Mukim of Chengkau, Rembau, Negeri Sembilan (the said land).

- d** On 29 September 1984, the second defendant entered into an agreement with the first defendant whereby the first defendant agreed to develop the said land by the construction of 6 units of double storey and 3 units of single storey shophouses (the project). On 6 December 1984, the first defendant in turn entered into a building contract with the plaintiff whereby the plaintiff agreed to complete construction of the project not later than 6 May 1985 for a consideration of RM532,438. Under Clause 30 of this building contract, all interim progress payments were to be honoured by the first defendant within 2 weeks of the receipt of such claims.

- e** Claims totalling RM401,021.40 on the first and second progress payments were sent to the first defendant on 26 January 1985 and 1 March 1985, but instead of receiving payments from the first defendant, the plaintiff received a letter dated 6 March 1985 from the second defendant informing it that he had already entered into an arrangement with the first defendant whereby he agreed to take full responsibility in completing the project.

- f** Following this, on 21st March, 1985, the second defendant entered into a written agreement (secondary agreement) with the plaintiff whereby, *inter alia*, the second defendant undertook to apply for a RM160,000 loan from United Asian bank in order to settle all sums due and owing to the plaintiff in the construction of the project. Unfortunately, the second defendant was not able to obtain the loan and therefore not able to settle the claims on the 2 progress payments resulting in the plaintiff bringing this present action to recover the total sum due
- g** on the 2 progress payments with interest from both defendants.

- Following the filing of the statement of defence by both the defendants the plaintiff proceeded to obtain final judgment under O. 14 before the Senior Assistant Registrar but its application was dismissed with costs. Dissatisfied, the plaintiff appealed against the Registrar's order and on 30 May 1986, I confirmed the Registrar's order by dismissing the appeal with costs.
- h** The plaintiff then applied for further arguments in open Court and in this subsequent proceedings, I reversed my earlier order made in chambers by allowing the appeal with costs and ordering that judgment be entered for the plaintiff against both the defendants on the sums claimed pursuant to its O. 14 application. Only the second defendant has appealed against this order.

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In disputing liability, the second defendant had argued that

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- (1) since the claims were issued pursuant to the building contract to which he was not a party, he cannot be held responsible to meet payment.
- (2) by his letter dated 6 March 1985, he had not assumed full responsibility for the first defendant's liability but merely confirmed the termination of the first defendant's appointment as the developer of the project.
- (3) the secondary agreement dated 21 March 1985 is null and void for lack of consideration and if valid, the plaintiff had breached the agreement for failing to assist him in obtaining the loan and for abandoning work on the project.

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Admittedly, the building agreement dated 6 December 1984 is not made between the plaintiff and the second defendant but between the plaintiff and the first defendant. However, it is clear that when payment for the 2 progress claims was sought for from the first defendant on 26 January 1985 and 1 March 1985 the second defendant had instead responded immediately by writing Exhibit A-3 dated 6th March 1985 which is attached to his affidavit dated 27 January 1986. In A3, the second defendant advised the plaintiff that since 25 February 1985, he had taken over direct control of the project and that the first defendant had surrendered all its rights and authorities as the project manager to him under the terms of the agreement it had with the second defendant dated 29 September 1984. The letter also enlisted the assistance of the plaintiff to set up a meeting between them so that work on the project will not be delayed.

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Following the despatch of this letter and presumably after a meeting had been held between them, the secondary agreement dated 21 March 1985 was executed between them. Thus the letter dated 6 March 1985 cannot be read in isolation to determine the full extent of the obligations of the parties. It was advisor only as to the cause of action to be taken which culminated in the execution of the secondary agreement in which the rights and obligations of both parties are clearly set out.

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The preamble to that agreement sets out the status, the desires, of the parties, the acceptance of the plaintiff as the contractor of the project and the state of construction at the date of the contract. By Clause 5 the second defendant acknowledges that the plaintiff is entitled to all payments due in respect of the project. As at that point of time, there were 2 claims of progress payments which the first defendant had failed to settle and the second defendant cannot deny knowledge that these claims were not due and owing, as on his own admission in his letter dated 6 March 1985, he had informed the plaintiff that he had agreed with the first defendant to take over the whole project. To me, this must mean taking over all the rights and liabilities of the first defendant. The subsequent action of the second defendant in readily entering into the secondary agreement with the plaintiff on 21 March 1985, is in itself an admission that not only was he anxious to have the project completed but that he was willing to meet payment of all sums due under the building contract dated 6 December 1984 which should have been rightfully settled by the first defendant in the first instance. However, since he had willingly taken over control of the whole project from the first defendant and had willingly executed secondary agreement to meet payment of all sums due to the plaintiff, there is therefore no merit to the second defendant's contention that he cannot be held liable to meet payment for claims issued pursuant to an agreement to which he was not a party.

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a As to the second defendant's allegation of total failure of consideration in the secondary agreement, I consider that there is also no merit to this contention as forbearance to pay until after the second defendant had obtained a loan is sufficient consideration for this contract.

b As to the allegation that the plaintiff had breached the secondary agreement by failing to assist him in obtaining the loan, which the second defendant maintains is a condition precedent to the agreement, I see there is no such condition prescribed in the agreement.

The second defendant has also alleged that the plaintiff had breached the agreement by abandoning work on the project. The answer to this lies in Clause 3(b) where upon the release of the bank loan of RM160,000 to the plaintiff directly, plaintiff undertook to continue and complete the project irrespective of whether any further payment had been tendered. It would appear from this clause that payment of the RM160,000 was a condition precedent to the plaintiff continuing with the construction of the project. Since the loan was never obtained, there can be no question of the plaintiff committing any breach of the secondary agreement. Moreover in Clause 8, the parties had declared that they would allow the agreement to operate between them with fairness and without detriment to the interests of both. By virtue of this clause, it is only just and proper that the second defendant should be held responsible for the payment of the sums claimed for work done on a project that will be of great financial benefit to him.

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Also found at [1987] 2 CLJ 335

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